

transportation of hydraulic cement, that few rates exceeded the agency's rate reasonableness jurisdiction, and that associated tariff filing requirements were potentially costly and burdensome.² Conditions have changed. Cement manufacturers are shipping cement longer distances and from fewer plants than ever before, and potentially burdensome agency tariff filing requirements have long been eliminated. Meanwhile, competition among railroads and alternative shipping options has shrunk. Rail shipping costs and the railroad companies' revenue to long run variable cost ("R/VC") ratios for hydraulic cement have increased dramatically, as confirmed by the Board's analysis, and verified by PCA's independent analysis. *Average* R/VC ratios for cement traffic exceed the Board's threshold for maximum rate relief (R/VC greater than or equal 180%),³ and 55% of cement commodity revenues, cars, and tons are potentially captive under the Board's standards. Potentially captive traffic is defined by the Board as traffic with an R/VC ratio greater than 180%.⁴ Reversing the exemption will further the public interest by lowering barriers to regulatory relief and providing basic backstop protections to hydraulic cement shippers available to most other bulk commodity shippers.

DISCUSSION

I. Background

When Congress first authorized the availability of commodity and service exemptions in a different era over forty years ago, it did so only after ensuring that such initiatives would not unduly infringe upon the necessity of fair and reasonable railroad rates and services, and the need to protect rail customers from abuses of market power.⁵ For example, U.S. Rail Transportation Policy, then, as now, sets forth several important goals that the Board is tasked with implementing when determining whether to grant or revoke a particular commodity or class of service exemption.⁶ Relevant here, those goals include:

² *Rail General Exemption Authority – Exemption of Hydraulic Cement*, Ex Parte No. 346 (Sub-No. 34) (ICC served July 26, 1995), 1995 WL 438371 at *4 (“*Hydraulic Cement Exemption Decision*”).

³ See 79 U.S.C. 10707 (determination of market dominance).

⁴ See Review of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No.1) (STB served Mar. 23, 2016) at 4.

⁵ *Railroad Revitalization and Regulatory Reform Act of 1976*, Pub. L. No. 94-210, 90 Stat. 31 (1976).

⁶ 49 U.S.C. § 10101.

- (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
- (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
- ...
- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
- (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
- ...
- (9) to encourage honest and efficient management of railroads;
- ...
- (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;
- ...
- (15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.⁷

While Congress has provided the Board with discretion to exempt classes of goods from regulation, it is authorized to do so only when regulation is not needed to carry out Rail Transportation Policy and where the service is limited in scope or statutory protections are not needed to protect shippers against possible abuses of market power.⁸ *See Rail General Exemption Authority – Miscellaneous Manufactured Commodities*, Ex Parte No. 346 (Sub-No. 24), 6 I.C.C.2d 186, 191 (1989) (exemptions were “carefully narrowed . . . to include only commodities for which there are adequate intermodal alternatives to assure competitive transportation”). Further, these

⁷ *Id.*

⁸ 49 U.S.C. § 10502 (discussed in further detail below).

exemptions, and the power to remove exemptions,⁹ allow the Board to reevaluate market conditions and make regulatory oversight decisions based upon current market data.

In 1995, the ICC granted the American Association of Railroads' request for a commodity exemption for hydraulic cement.¹⁰ The Commission found "pervasive competition in the transportation of hydraulic cement" and that the exemption was appropriate because railroad companies faced sufficient intra- and intermodal competition, thereby constraining the opportunity for market power abuses.¹¹ It based its decision on a general finding that hydraulic cement shippers had multiple transportation options, including rail, truck, and barge. The ICC stated that, "these competing forces have acted to keep rail rates at competitive levels."¹² Further, the agency found that the exemption furthered public policy by "eliminating the costs associated with tariff and contract rate establishment and management," and "improving the speed and flexibility with which carriers can respond to shippers' needs" – because the act of revocation eliminated the former rail contract summary and tariff filing requirements for this traffic.

In 2010, the Board sought public comments on the revisiting of the Board's rail service and commodity exemptions,¹³ followed by a public hearing on February 24, 2011. PCA and individual cement shippers participated in these proceedings, and provided comments and testimony in support of hydraulic cement exemption revocation.¹⁴ Among other things, cement shippers argued that the changed transportation and cement industry dynamics, including a reduction in cement manufacturing plants, reduced transportation options, reduced railroad competition, increased rail rates, and increased market power and abuses by railroads fully warranted revocation of the cement commodity exemption.

As discussed further below, in its Proposal, the Board has correctly determined that conditions have changed, and the exemption for hydraulic cement and several other commodities should be removed to properly carry out the goals of Rail Transportation Policy and protect

⁹ See 49 U.S.C. 10502(d).

¹⁰ *Hydraulic Cement Exemption Decision*.

¹¹ *Id.*, 1995 WL 438371 at *4.

¹² *Id.*

¹³ *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Ex Parte No. 704 (STB served Oct. 21, 2010).

¹⁴ See, e.g., PCA Comments (filed Jan. 31, 2011); Holcim (US) Inc. Comments (filed Jan. 31, 2011); CEMEX, Inc. Comments (filed Feb. 1, 2011).

shippers from potential market abuse. The Board's Proposal was based on a close and careful review of all stakeholder comments and the Board's own independent analysis of relevant market and carrier waybill data. The Board has requested comments as to whether its proposed revocation of individual commodity exemptions, as well as other exemption revocations, should be adopted, and has asked interested parties for additional information on relevant market conditions and competitive data.

As explained below, and for the reasons set forth in PCA's 2011 Comments, the Board's analysis and conclusions are well supported. The exemption for hydraulic cement should be lifted.

II. The Surface Transportation Board Has Correctly Determined That The Regulatory Exemption For Hydraulic Cement Should Be Revoked

Application of the standards for issuing or revoking an exemption to current market conditions and pertinent available data on hydraulic cement shipments demonstrates that revoking the exemption is appropriate and fully warranted.

The Board may exempt commodities if it finds that (1) the Board's authority to oversee rates and practices is not necessary to carry out Rail Transportation Policy under 49 U.S.C. §10101, and (2) either (a) the "transaction or service is of limited scope" or (b) "the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power."¹⁵ Similarly, the Board may revoke an exemption "when it finds that application *in whole or part* of a provision of this part [. . .] is necessary to carry out the transportation policy of [49 U.S.C. §10101]."¹⁶ Here, based on a full review of the relevant testimony, data, and facts, including an independent analysis by the Board of the relevant waybill data, the Proposal properly found that changes in market conditions support a finding that application of the Board's oversight authority for hydraulic cement is necessary to carry out Rail Transportation Policy and to protect shippers from abuse of carrier market power.

A. National Transportation Policy Requires Revocation of the Exemption

Rail Transportation Policy, generally, directs the U.S. government to create policies that foster competition and reasonable rates, while avoiding concentrations of market power.¹⁷ While

¹⁵ 49 U.S.C. §10502(a).

¹⁶ 49 U.S.C. §10502(d) (emphasis added).

¹⁷ See 49 U.S.C. §10101.

the Board found the exemption of hydraulic cement appropriate twenty years ago, conditions have changed. As the Board's Proposal has found, "changes in the rail and cement industries appear to have significantly reduced the effectiveness of competitive transportation alternatives," warranting removal of the hydraulic cement exemption in fulfillment of the national Rail Transportation Policy.¹⁸ Meanwhile, the prior agency tariff filing requirements have long been eliminated and are no longer any constriction on the provision of railroad rates and service – a major basis for the Board's 1995 decision to exempt hydraulic cement.¹⁹

Competition for transportation of hydraulic cement has diminished significantly in the 20+ years since the agency last considered the exemption of hydraulic cement. Shipping hydraulic cement via truck is generally economically feasible for distances less than 125 miles.²⁰ In contrast to the ICC's 1995 findings that most shipments covered shorter distances between 200-250 miles, with average length of haul for UP less than 200 miles, and for NS, less than 250 miles,²¹ today, hydraulic cement shipments by rail, on average, are over 400 miles as reflected in the STB's Carload Waybill Sample.²² Accordingly, the ICC's 1995 finding that cement producers "cannot compete for business in markets more than 300 miles away"²³ is no longer supportable. This is, in part, because the number of cement manufacturing plants has fallen from 172 in 1974 to fewer than 100 presently in operation. There are 23 fewer plants in operation today than there were when the Board originally exempted hydraulic cement. As cement manufacturing plants closed, many customers were no longer located near the point of production. Companies were forced to ship the same product longer distances to meet their customers' needs.

Because cement manufacturers in many instances have few alternatives to shipping via railroad, shippers of hydraulic cement are subject to market power abuses by the railroads. For shipments to terminals, comprising a significant portion of hydraulic cement hauls, rail continues to dominate. Data from the 2013 U.S. Geological Survey shows that 50% of all shipments between

¹⁸ Proposal at 9-10.

¹⁹ *Hydraulic Cement Exemption Decision*, 1995 WL 438371 at *4

²⁰ Proposal at 10 (citing PCA Comments).

²¹ *Hydraulic Cement Exemption Decision*, 1995 WL 438371 at *2.

²² Hellerworx analysis of STB Carload Waybill Sample, STCC 32-4 (year 2014).

²³ *Id.*

cement plants and distribution terminals are made by railroad.²⁴ As aforementioned, trucking is not a feasible option in many circumstances, nor is barge or vessel, especially where the cement plant or serving terminal do not have such modal access.

Meanwhile, intra and intermodal competitive options have shrunk. As railroads became deregulated, many rail companies merged, and trucking options have become more limited, resulting in fewer options for long-haul shipments. The Government Accountability Office (“GAO”), in a 2006 report, stated, “Over the past 10 years, significant consolidation has taken place in the freight railroad industry [...]”²⁵ GAO further reported that, “[o]ver the past 30 years, the freight railroad industry has become more concentrated. In 1976, there were 30 independent Class I railroad systems . . . Currently there are seven.”²⁶ Today there remain 7 Class I railroads, with an effective duopoly in the East and a duopoly in the West. Most cement shippers are served at origin or destination by only one railroad, and even in the very limited instances, if any, where there might be dual carrier service available, competition in a consolidated market environment has been far less than robust, as is reflected in the waybill costing data, as discussed below. Thus, there are fewer shipping alternatives, and there is less competition.

The significant change in market conditions and the lack of robust intra- or intermodal competition for hydraulic cement is readily demonstrated in the relevant railroad waybill data. The R/VC ratios²⁷ for hydraulic cement demonstrate that much of the traffic is fully subject to captive pricing. The Board defines potentially captive traffic as traffic with an R/VC ratio greater than 180%.²⁸ Here, the Board’s own waybill data analysis, reproduced in *Figure 1* below, reveals that the average R/VC ratio for all cement traffic for 2013 has increased to 183% -- a substantial increase of 49 percentage points from 1992 levels of 134%:

²⁴ *2013 Minerals Yearbook, Cement*, U.S. Geological Survey, U.S. Dept. of the Interior (Dec. 2015) at 16.17,

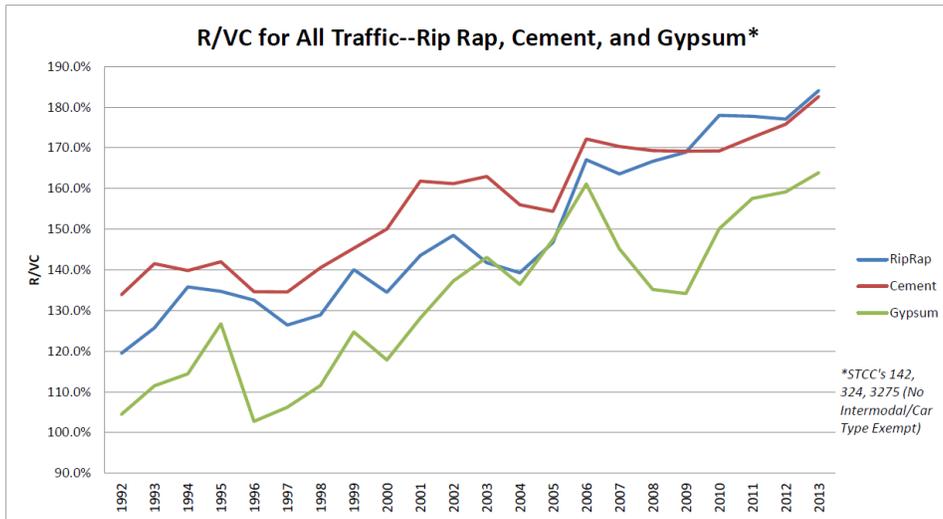
²⁵ United States Government Accountability Office Report to Congressional Requesters, GAO 7-94 (Oct. 2006) at 1.

²⁶ *Id.*

²⁷ The R/VC is the ratio of railroad revenue over the long run variable cost incurred by the railroads to move the freight.

²⁸ See *Review of Commodity, Boxcar, & TOFC/COFC Exemptions, EP 704 (Sub-No.1)* (STB served Mar. 23, 2016) at 4.

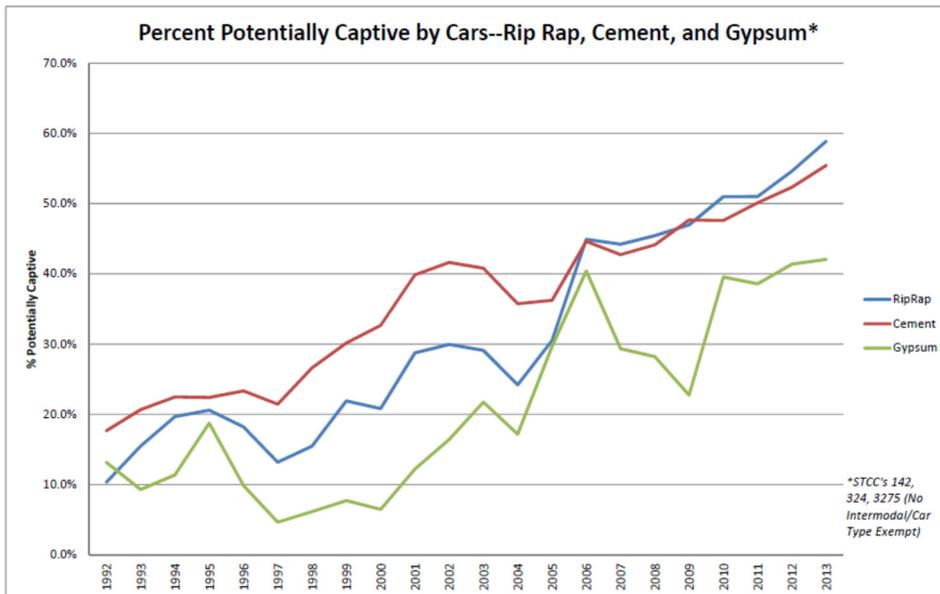
Figure 1



STB "EP 704-1 STB Public Workpaper(7).xlsx" (located at <http://www.stb.dot.gov/stb/rail/Exemption.html>).

Meanwhile, the Board's waybill analysis of the percentage of potentially captive traffic for cement, by carload, reproduced in *Figure 2* below, reflects that the percentage of such traffic that is potentially captive has jumped from 18% in 1992 to 55% in 2013 – an increase of 37 percentage points (with very similar percentage increases when analyzed by revenues or tons):

Figure 2



STB "EP 704-1 STB Public Workpaper(7).xlsx" (located at <http://www.stb.dot.gov/stb/rail/Exemption.html>).

Finally, the Board's waybill analysis of the R/VC ratios for potentially captive traffic for cement reflects that the R/VC ratios on such traffic have grown from 208% in 1992 to 240% in 2013.²⁹

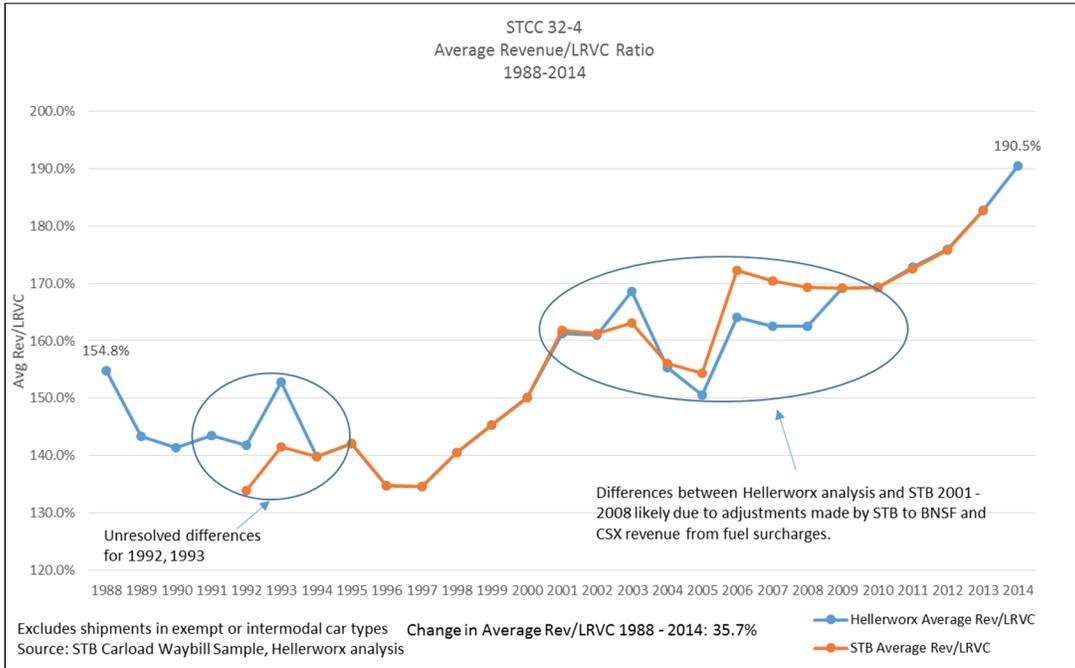
These dramatic increases in R/VC ratios and the percentage of potentially captive traffic (by revenues, carloads, and tons) fully reflect and confirm the fact that many hydraulic cement shippers lack other non-rail effective competitive options for their long haul shipping. Market competition is not restraining rates. Instead, rates continue to increase significantly because there is no effective competition for the shipments that rely on railroads for service. As evidenced by the data and the Board's analysis, cement shippers frequently have limited service options and the rail carriers have capitalized on this, knowing that shippers are rendered captive and are unable to even secure common carrier rates or bring a rate case even when the R/VC ratios exceed 180%.

In response to the Board's request for additional analysis of its Proposal, PCA has undertaken an analysis of the STB's Carload Waybill Sample data for the years 1987 through 2014 for hydraulic cement (STCC 32-4) to verify the Board's analysis, through an analysis undertaken by James N. Heller of Hellerworx. Mr. Heller's analysis fully supports and confirms the above-referenced STB analysis for the period for hydraulic cement.

Using the same Carload Waybill Sample analyzed by the Board, updated through 2014, and dating back to 1988, *Figure 3* below reflects Mr. Heller's analysis of the waybill data to calculate average R/VC ratios for hydraulic cement over the period. Mr. Heller's analysis is plotted against the STB's analysis, and as shown, except for a few data anomalies, closely matches the STB's results. Mr. Heller's analysis reflects an average R/VC ratio for hydraulic cement of 191% for the latest data year available (2014):

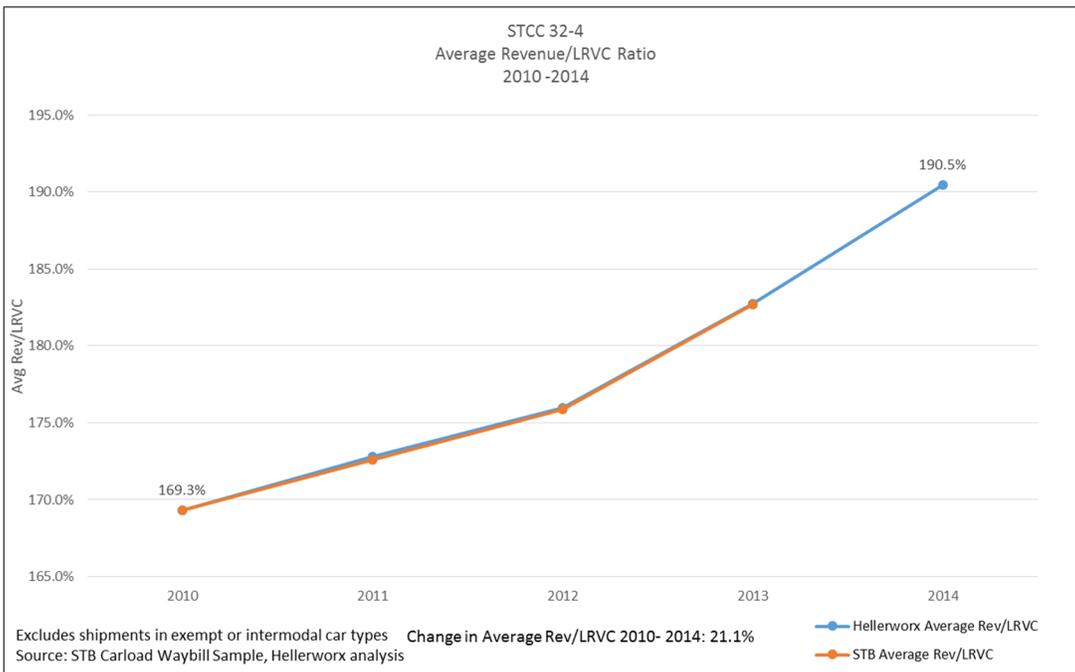
²⁹ EP 704-1 STB Public Workpaper(7).xlsx" (located at <http://www.stb.dot.gov/stb/rail/Exemption.html>).

Figure 3



As revealed in this analysis, the average R/VC ratios for hydraulic cement have increased significantly in recent years – or by over 21 percentage points over the last four years of available data (2010 to 2014) since the Board initiated this proceeding, as reflected in *Figure 4* below:

Figure 4



Using the same updated Carload Waybill Sample analyzed by the Board, Mr. Heller also analyzed the data to calculate percentage of potentially captive traffic for hydraulic cement, by carloads, revenues, and tons. Mr. Heller’s analysis is shown in *Figures 5* through *7* below, and is plotted against the STB’s potentially captive traffic analysis. His analysis largely matches the STB’s results, and reflects dramatic increases in captivity, with approximately 60% of cement shippers shown as potentially captive (year 2014), whether measured by carloads, tons, or revenues. These increases are also particularly significant in recent years, reflected in an over 12 percentage point increase in cement shipper potential captivity over the last four years of available data (2010 to 2014) since the Board initiated this proceeding:

Figure 5

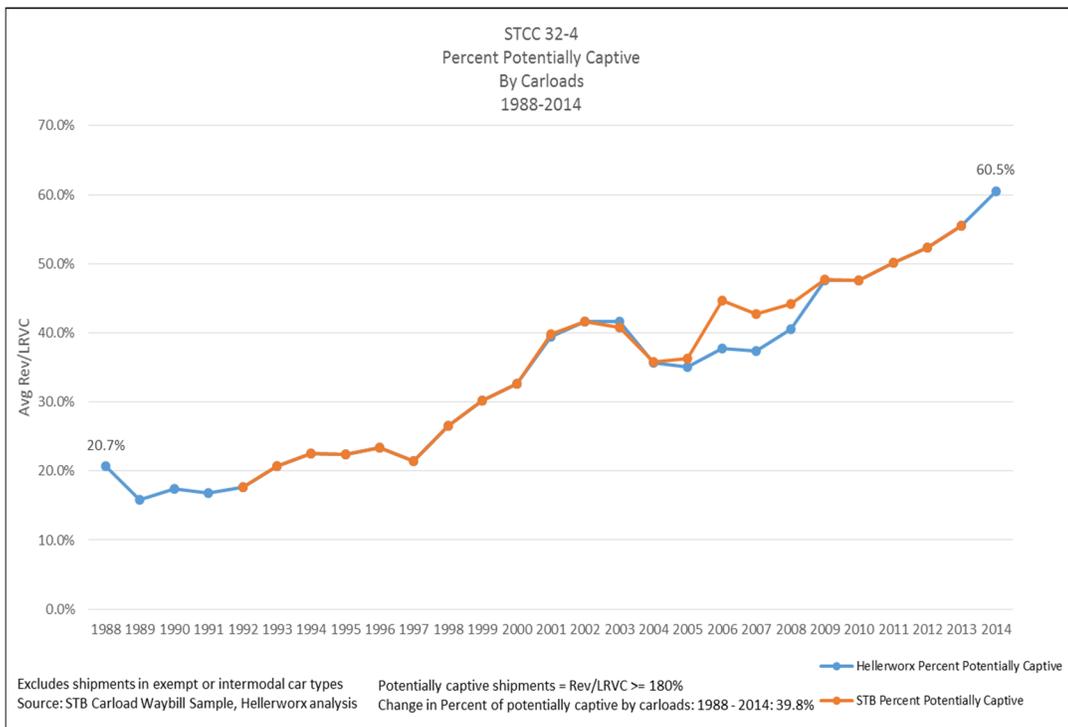


Figure 6

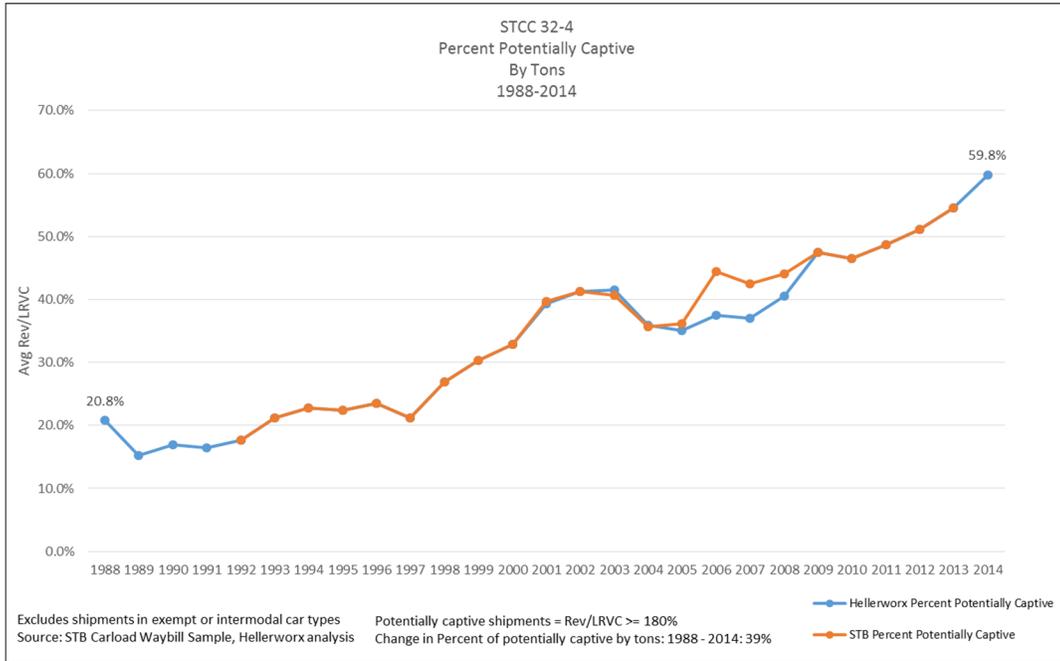
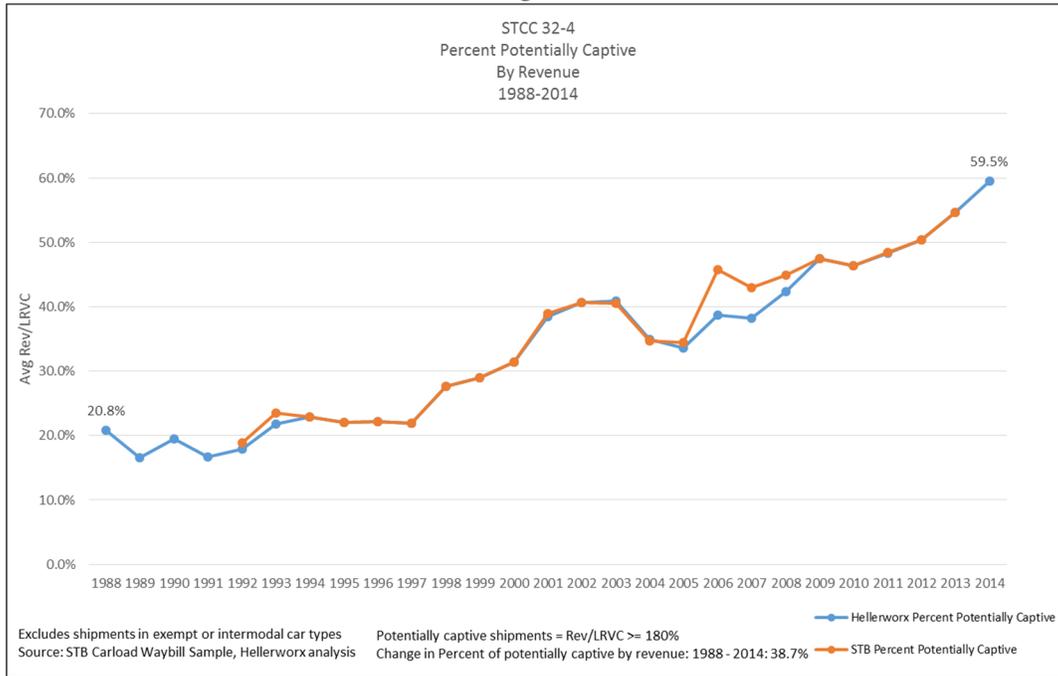


Figure 7



Finally, Mr. Heller's analysis reflects that, in 2014, the average R/VC ratio for potentially captive shipments of hydraulic cement has now grown to 244%, from 213% in 1992.³⁰

The high R/VC ratios for hydraulic cement as reflected in the Board's analysis, and as confirmed in Mr. Heller's analysis, as well as the dramatic jump in potential captivity for the traffic, should be of no surprise. It is the railroad industry's stated policy to charge higher prices to their most captive shippers whenever they can.³¹ While differential pricing is an accepted industry practice, the prices that rail companies charge to ship hydraulic cement is nowhere near competitive, as fully demonstrated above.

The ICC's 1995 decision adopting the exemption for hydraulic cement was justified in part on the basis that "[a] very small percentage of all current cement shipments are actually moving within reach of the Commission's rate reasonableness jurisdiction."³² In stark contrast, today, the *average* R/VC ratios for cement exceed the Board's rate reasonableness jurisdiction, the percentage of potentially captive cement traffic has reached 60%, and that universe has been growing significantly. Additionally, the R/VC ratios for potentially captive cement traffic have grown by well over 48 percentage points between 1992 and 2014 to 244%. PCA understands the need for certainty in recovery of fixed costs, and appreciates the willingness of the railroads to invest in infrastructure. However, these R/VCs clearly support and reinforce the Proposal's findings that revocation of the exemption for hydraulic cement "is necessary to carry out the transportation policy of [49 U.S.C.] section 10101"³³

CONCLUSION

PCA appreciates the opportunity to submit these comments. For the reasons set forth above, and in PCA's January 2011 comments, PCA respectfully requests that that the Board adopt its Proposal to remove the existing class exemption for hydraulic cement.

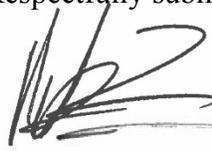
³⁰ Hellerworx analysis of STB Carload Waybill Sample, STCC 32-4 (years 1988 to 2014).

³¹ Association of American Railroads, *Differential Pricing in the Rail Industry* (May 2015).

³² *Hydraulic Cement Exemption Decision*, 1995 WL 438371 at *4.

³³ 49 U.S.C. §10502(d).

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'MS', with a long horizontal line extending to the right from the bottom of the signature.

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CERTIFICATE OF SERVICE

I hereby certify that this 26th day of July, 2016, I have caused copies of the forgoing to be served via first-class mail, postage prepaid upon all parties of record to this case.



Michael Schon